

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 07, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESTHER S.,¹

Plaintiff,

v.

KILOLO KIJAKAZI,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant

No: 1:20-cv-03230-LRS

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment.
ECF Nos. 24, 25. This matter was submitted for consideration without oral

¹ The court identifies a plaintiff in a social security case only by the first name and last initial in order to protect privacy. *See* LCivR 5.2(c).

1 argument. Plaintiff is represented by attorney D. James Tree. Defendant is
2 represented by Special Assistant United States Attorney Kelly S. Arefi. The Court,
3 having reviewed the administrative record and the parties' briefing, is fully
4 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 24, is
5 denied and Defendant's Motion, ECF No. 25, is granted.

6 **JURISDICTION**

7 Plaintiff Esther S. (Plaintiff), filed for disability insurance benefits (DIB) on
8 March 16, 2018, alleging an onset date of October 31, 2017. Tr. 165-73. Benefits
9 were denied initially, Tr. 91-97, and upon reconsideration, Tr. 99-105. Plaintiff
10 appeared at a hearing before an administrative law judge (ALJ) on December 19,
11 2019. Tr. 34-68. On February 19, 2020, the ALJ issued an unfavorable decision, Tr.
12 12-30, and on October 2, 2020, the Appeals Council denied review. Tr. 1-6. The
13 matter is now before this Court pursuant to 42 U.S.C. § 405(g).

14 **BACKGROUND**

15 The facts of the case are set forth in the administrative hearings and
16 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and
17 are therefore only summarized here.

18 Plaintiff was born in 1968 and was 51 years old at the time of the hearing. Tr.
19 36-37. She last worked in May and June 2019 sorting cherries. Tr. 35-36. The job
20 ended because it was the end of the cherry season. Tr. 36. She also has work
21 experience sorting apple chips, as a janitor, and as a meat seasoner. Tr. 51. Plaintiff

1 has an atrial septal defect and alleges it causes her to feel tired, fatigued, and in pain.
2 Tr. 201. It causes shortness of breath, heart palpitations, and dizziness. Tr. 201.
3 She had open heart surgery in May 2018. Tr. 37, 41. She testified that since her
4 heart surgery, she has had pain in her neck, shoulders, and hip and has frequent
5 headaches. Tr. 45-46.

6 STANDARD OF REVIEW

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported by
10 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
11 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
12 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and
13 citation omitted). Stated differently, substantial evidence equates to "more than a
14 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).
15 In determining whether the standard has been satisfied, a reviewing court must
16 consider the entire record as a whole rather than searching for supporting evidence in
17 isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156
20 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one
21 rational interpretation, [the court] must uphold the ALJ's findings if they are

1 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
2 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s
3 decision on account of an error that is harmless.” *Id.* An error is harmless “where it
4 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
5 (quotation and citation omitted). The party appealing the ALJ’s decision generally
6 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
7 396, 409-10 (2009).

8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within the
10 meaning of the Social Security Act. First, the claimant must be “unable to engage in
11 any substantial gainful activity by reason of any medically determinable physical or
12 mental impairment which can be expected to result in death or which has lasted or
13 can be expected to last for a continuous period of not less than twelve months.” 42
14 U.S.C. §§ 423(d)(1)(A). Second, the claimant’s impairment must be “of such
15 severity that he is not only unable to do his previous work[,] but cannot, considering
16 his age, education, and work experience, engage in any other kind of substantial
17 gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A).

18 The Commissioner has established a five-step sequential analysis to determine
19 whether a claimant satisfies the above criteria. *See* 20 C.F.R. § 404.1520(a)(4)(i)-
20 (v). At step one, the Commissioner considers the claimant’s work activity. 20
21 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in “substantial gainful

1 activity,” the Commissioner must find that the claimant is not disabled. 20 C.F.R. §
2 404.1520(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers from
6 “any impairment or combination of impairments which significantly limits [his or
7 her] physical or mental ability to do basic work activities,” the analysis proceeds to
8 step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment does not satisfy
9 this severity threshold, however, the Commissioner must find that the claimant is not
10 disabled. 20 C.F.R. § 404.1520(c).

11 At step three, the Commissioner compares the claimant’s impairment to
12 severe impairments recognized by the Commissioner to be so severe as to preclude a
13 person from engaging in substantial gainful activity. 20 C.F.R. §
14 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 404.1520(d).

17 If the severity of the claimant’s impairment does not meet or exceed the
18 severity of the enumerated impairments, the Commissioner must assess the
19 claimant’s “residual functional capacity.” Residual functional capacity (RFC),
20 defined generally as the claimant’s ability to perform physical and mental work
21

1 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
2 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in the
5 past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is capable
6 of performing past relevant work, the Commissioner must find that the claimant is
7 not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of performing
8 such work, the analysis proceeds to step five.

9 At step five, the Commissioner should conclude whether, in view of the
10 claimant's RFC, the claimant is capable of performing other work in the national
11 economy. 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the
12 Commissioner must also consider vocational factors such as the claimant's age,
13 education and past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant
14 is capable of adjusting to other work, the Commissioner must find that the claimant
15 is not disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of
16 adjusting to other work, analysis concludes with a finding that the claimant is
17 disabled and is therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

18 The claimant bears the burden of proof at steps one through four above.
19 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
20 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
21 capable of performing other work; and (2) such work "exists in significant numbers

1 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d
2 386, 389 (9th Cir. 2012).

3 **ALJ’S FINDINGS**

4 At step one, the ALJ found Plaintiff engaged in substantial gainful activity
5 since the alleged onset date, but there was a continuous 12-month period during
6 which Plaintiff did not engage in substantial gainful activity. Tr. 17. At step two,
7 the ALJ found that Plaintiff has the following severe impairments: chronic heart
8 failure and obesity. Tr. 18. At step three, the ALJ found that Plaintiff does not have
9 an impairment or combination of impairments that meets or medically equals the
10 severity of a listed impairment. Tr. 18.

11 The ALJ then found that Plaintiff has the residual functional capacity to
12 perform light work with the following additional limitations:

13 The claimant can occasionally climb ramps or stairs, but never climb
14 ladders, ropes, or scaffolds. She can occasionally crouch and crawl.
15 She must avoid concentrated exposure to extreme cold; extreme heat;
pulmonary irritants such as fumes, odors, and gases; and workplace
hazards.

16 Tr. 19.

17 At step four, the ALJ found that Plaintiff is able to perform past relevant work
18 as an agricultural produce sorter. Tr. 24. Alternatively, at step five, after
19 considering the testimony of a vocational expert and Plaintiff’s age, education, work
20 experience, and residual functional capacity, the ALJ found there are other jobs that
21 exist in significant numbers in the national economy that Plaintiff can perform such

1 as housekeeping cleaner, cashier II, or marker. Tr. 25. Thus, the ALJ concluded
2 that Plaintiff has not been under a disability, as defined in the Social Security Act,
3 from October 31, 2017, through the date of the decision. Tr. 26.

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 disability income benefits under Title II of the Social Security Act. ECF No. 24.
7 Plaintiff raises the following issues for review:

- 8 1. Whether the ALJ properly considered Plaintiff's symptom testimony; and
- 9 2. Whether the ALJ properly considered the medical opinion evidence.

10 ECF No. 24 at 2.

11 DISCUSSION

12 A. Symptom Testimony

13 Plaintiff contends the ALJ improperly rejected her symptom testimony. ECF
14 No. 24 at 7-13. An ALJ engages in a two-step analysis to determine whether a
15 claimant's testimony regarding subjective pain or symptoms is credible. "First, the
16 ALJ must determine whether there is objective medical evidence of an underlying
17 impairment which could reasonably be expected to produce the pain or other
18 symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
19 "The claimant is not required to show that her impairment could reasonably be
20 expected to cause the severity of the symptom she has alleged; she need only show
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1 that it could reasonably have caused some degree of the symptom.” *Vasquez v.*
2 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

3 Second, “[i]f the claimant meets the first test and there is no evidence of
4 malingering, the ALJ can only reject the claimant’s testimony about the severity of
5 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
6 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
7 citations and quotations omitted). “General findings are insufficient; rather, the ALJ
8 must identify what testimony is not credible and what evidence undermines the
9 claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (1995); *see*
10 *also Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ must make
11 a credibility determination with findings sufficiently specific to permit the court to
12 conclude that the ALJ did not arbitrarily discredit claimant’s testimony.”). “The
13 clear and convincing [evidence] standard is the most demanding required in Social
14 Security cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting
15 *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

16 In assessing a claimant’s symptom complaints, the ALJ may consider, *inter*
17 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
18 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s
19 daily living activities; (4) the claimant’s work record; and (5) testimony from
20 physicians or third parties concerning the nature, severity, and effect of the
21 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

1 First, the ALJ found Plaintiff's allegations are not supported by the objective
2 evidence. Tr. 20. An ALJ may not discredit a claimant's pain testimony and deny
3 benefits solely because the degree of pain alleged is not supported by objective
4 medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001);
5 *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d
6 597, 601 (9th Cir. 1989). However, the medical evidence is a relevant factor in
7 determining the severity of a claimant's pain and its disabling effects. *Rollins*, 261
8 F.3d at 857. Minimal objective evidence is a factor which may be relied upon in
9 discrediting a claimant's testimony, although it may not be the only factor. *See*
10 *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).

11 The ALJ observed that Plaintiff's physical exams after heart surgery in May
12 2018 were generally normal, that her condition had improved, and that her sternal
13 wound had healed well. Tr. 20 (citing Tr. 446-47, 684, 694, 696, 702, 827-29, 834,
14 844, 846, 849). She complained of significant sternal pain in June 2018 but
15 acknowledged she had not been taking pain medication as prescribed and she was
16 improving despite minimal medication. Tr. 20, 694, 696. More than a year after
17 surgery, she was noted to have a good result with no residual symptoms and no
18 additional treatment or follow up was recommended. Tr. 20, 957.

19 Plaintiff argues she testified that "her primary physical barrier to working is
20 pain, not issues with her heart," and asserts the ALJ "entirely ignores record
21 evidence that [Plaintiff's] pain was significantly aggravated by working." ECF

1 No. 24 at 9 (citing Tr. 43, 45). Plaintiff cites records from June and July 2019
2 when Plaintiff complained of neck, back, and shoulder, and hip pain. Tr. 906-07,
3 910, 911. She was having worsening neck and hip pain since working sorting
4 cherries and which was improved after taking three days off work. Tr. 907-08,
5 910. She stated she was “grabbing boxes and putting them on the line” and left
6 with “a lot of pain in the neck and hip.” Tr. 911.

7 The ALJ considered Plaintiff’s pain complaints in evaluating her May 2019
8 diagnosis of cervicalgia. Tr. 18, 829. The ALJ noted MRI results showed mild
9 spondylosis C4-7 with no central or foraminal stenosis at any level, Tr. 830, 832.
10 Tr. 18. A nerve conduction study led to the conclusion that Plaintiff’s neck and
11 upper back pain were primarily muscular and biomechanical in nature, and it was
12 noted that her neck and shoulder pain had previously significantly improved with
13 physical therapy. Tr. 18, 20, 788-826, 836, 859, 861, 890, 893. By August 2019,
14 she still complained of pain but said her daughter taught her exercises that helped
15 and was noted to be somewhat improved. Tr. 21, 919. She was awaiting an
16 appointment to begin physical therapy. Tr. 920. In September 2019, her neck and
17 back pain improved once she increased medication. Tr. 20, 927. She felt massage
18 and chronic pain classes had been helpful and got a referral for chiropractic
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20
21

1 treatment. Tr. 927. The ALJ reasonably considered the objective evidence in
2 evaluating Plaintiff's pain allegations.²

3 Second, the ALJ found Plaintiff's symptom statements are inconsistent with
4 the longitudinal record. Tr. 20-21. Contradiction with the medical record is a
5 sufficient basis for rejecting the claimant's subjective testimony. *Carmickle v.*
6 *Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008); *Johnson v.*
7 *Shalala*, 60 F.3d 1428, 1434 (9th Cir.1995). The ALJ noted records indicating that
8 post-heart surgery, Plaintiff's symptoms of dizziness and lightheadedness had
9 resolved. Tr. 20, 694, 859. Plaintiff agrees that her heart symptoms resolved after
10 surgery but argues her primary physical barrier to working is pain. ECF No. 24 at
11 9-10.

12 The ALJ observed that Plaintiff complained of intense burning chest pain
13 from her sternum in November 2018, about six months after surgery. Tr. 20, 859.
14 The ALJ considered Plaintiff's allegations of debilitating pain and concluded that
15 "one would expect her treating providers to note distress, discomfort, or
16 observations of behavior associated with pain." Tr. 21. Instead, the ALJ noted
17 that when presenting for medical appointments or exams over the course of the

18 ² The ALJ also found Plaintiff's cervicalgia is not a severe impairment as it did not
19 cause significant limitations in functioning or did not last for a continuous period
20 of 12 months, a finding which is not challenged by Plaintiff. Tr. 18. Nevertheless,
21 the ALJ considered this impairment throughout the decision. Tr. 18.

1 record, she often appeared in no acute or apparent distress from either her heart
2 issues or her back and neck pain, which the ALJ found to be inconsistent with her
3 allegations of extremely limiting pain and symptoms. Tr. 21, 283 (September
4 2017), 305 (May 2017), 312 (November 2017), 424-25 (January 2018), 684
5 (February 2018), 834 (June 2018), 888 (February 2019), 899 (May 2019), 902
6 (June 2019), 940 (September 2018). The ALJ consideration of the longitudinal
7 record is a reasonable inference based on substantial evidence.

8 Third, the ALJ found Plaintiff's reported activities are inconsistent with her
9 allegations of debilitating symptoms. Tr. 21-22. It is reasonable for an ALJ to
10 consider a claimant's activities which undermine claims of totally disabling pain in
11 assessing a claimant's symptom complaints. *See Rollins*, 261 F.3d at 857.
12 However, it is well-established that a claimant need not "vegetate in a dark room"
13 in order to be deemed eligible for benefits. *Cooper v. Bowen*, 815 F.2d 557, 561
14 (9th Cir. 1987). Notwithstanding, if a claimant is able to spend a substantial part
15 of her day engaged in pursuits involving the performance of physical functions that
16 are transferable to a work setting, a specific finding as to this fact may be sufficient
17 to discredit an allegation of disabling excess pain. *Fair*, 885 F.2d at 603.
18 Furthermore, "[e]ven where [Plaintiff's daily] activities suggest some difficulty
19 functioning, they may be grounds for discrediting the claimant's testimony to the
20 extent that they contradict claims of a totally debilitating impairment." *Molina*,
21 674 F.3d at 1113.

1 Before her heart surgery in May 2018, Plaintiff reported driving, going out
2 alone and often, shopping once a week, and doing housework. Tr. 19, 203-04.
3 About a month after her surgery, Plaintiff was getting frustrated because she had
4 pain with activity and was encouraged to do activities in smaller increments. Tr.
5 20, 697. In October 2018, she reported “difficulty [mowing] her lawn and
6 performing other activities of daily living due to [this] pain.” Tr. 20, 894. She also
7 reported doing more driving, although it was difficult to go long distances or drive
8 in traffic. Tr. 21, 857. In October, November, and December 2018, Plaintiff
9 reported trying to stay active by cleaning the house, cooking, and crocheting. Tr.
10 21, 854, 859, 861, 871. In September 2019 Plaintiff reported trying to walk on a
11 regular basis, but sometimes got a pain in her right knee or left leg. Tr. 21, 953;
12 *see* Tr. 898 (walking two miles every other day, no pain while walking for exercise
13 in May 2019). The ALJ found this is inconsistent with her allegations of
14 incapacitating pain as driving involves use of the head, shoulders and eyes. Tr. 21,
15 857. In all, these activities are not particularly compelling examples of activity
16 inconsistent with Plaintiff’s symptoms claims, as many of these activities were
17 qualified by Plaintiff or can be done in increments or in a manner consistent with
18 Plaintiff’s allegations. Nevertheless, the ALJ did not err in considering them; or
19 even if the ALJ did err, the error would be harmless because the ALJ cited other
20 legally sufficient reasons for giving less weight to Plaintiff’s symptom claims. *See*
21 *Carmickle*, 533 F.3d at 1162-63; *Molina*, 674 F.3d at 1115.

1 Fourth, the ALJ found that statements made by Plaintiff to qualify for
2 unemployment are inconsistent with her allegations of disability. Tr. 22. Receipt
3 of unemployment benefits may cast doubt on a claim of disability, as it shows that
4 an applicant holds himself out as capable of working. *Ghanim*, 763 F.3d at 1165;
5 *Copeland v. Bowen*, 861 F.2d 536, 542 (9th Cir. 1988). Here, Plaintiff confirmed
6 that she received unemployment benefits and held herself out as ready, willing, and
7 able to work and that she continued to look for work. Tr. 22, 36.

8 Notwithstanding, if the record does not establish whether the claimant held herself
9 out as available for full-time or part-time work, receipt of unemployment benefits
10 may not be inconsistent with disability allegations.³ *Carmickle*, 533 F.3d at 1161-
11 62. The record is not entirely clear regarding Plaintiff's availability for full-time
12 or part-time work, although she reported that sorting cherries involves a seven-day

13 ³ Plaintiff cites a 2010 letter from the then-chief ALJ in support of the proposition
14 that receipt of unemployment benefits does not disqualify a claimant from a
15 disability claim. ECF No. 24 at 12-13 (citing letter from Frank A. Cristaudo, Chief
16 Administrative Law Judge, Soc. Sec. Admin., to All Administrative Law Judges
17 (August 9, 2010), *available at*
18 <https://www.masslegalservices.org/system/files/library/CALJMemoUnempl.pdf>).
19 However, the same letter goes on to state that an application for unemployment
20 benefits is a factor to be considered with all of the evidence in the record.
21

1 work week and at least sometimes involves 16-hour days. Tr. 40, 279.

2 Nonetheless, this is a minor point and any error is harmless as other clear and
3 convincing reasons exist to support the ALJ's finding.

4 Fifth, the ALJ found Plaintiff's return to work detracts from the reliability of
5 her symptom statements. Tr. 22. The ALJ found that Plaintiff perceived she was
6 able to work in the same job as her past work and she returned to work sorting
7 cherries during the period at issue. Tr. 22. The ability to work may be considered
8 in assessing symptom claims. *See Bray v. Comm'r Social Security Admin.*, 554
9 F.3d 1219, 1227 (9th Cir.2009). Working with an impairment supports a
10 conclusion that the impairment is not disabling. *Drouin v. Sullivan*, 966 F.2d
11 1255, 1258 (9th Cir. 1992); *Bray*, 554 F.3d at 1227 (seeking work despite
12 impairment supports inference that impairment is not disabling). On the other
13 hand, short-term work, which does not demonstrate the ability to sustain
14 substantial gainful employment, may be considered an unsuccessful work attempt
15 instead of substantial gainful activity. *Gatliff v. Comm'r Soc. Sec. Admin.*, 172
16 F.3d 690, 694 (9th Cir. 1999); *see also Reddick v. Chater*, 157 F.3d 715, 722 (9th
17 Cir. 1998) ("Several courts, including this one, have recognized that disability
18 claimants should not be penalized for attempting to lead normal lives in the face of
19 their limitations.").

20 Plaintiff suggests her work during the relevant period is an unsuccessful
21 work attempt, stating "she unfortunately missed too many days due to pain for her

1 to successfully work a full-time job.” ECF No. 24 at 13 (citing Tr. 903, 906, 907,
2 910, 911, 914). While the record indicates that Plaintiff missed some days of work
3 in June and July 2019 for pain complaints, she earned wages constituting
4 substantial gainful activity of \$2,711 in the third quarter of 2019.⁴ Tr. 17, 186.
5 Plaintiff cites the vocational expert’s testimony that six or more unscheduled
6 absences in a year on a persistent basis would lead to termination, ECF No. 24 at
7 13 (citing Tr. 57), but it does not follow that because Plaintiff missed some days of
8 work over a two-month period that she was or would be terminated. Furthermore,
9 Plaintiff testified her job ended because it was seasonal, not because she missed
10 too many days of work. Tr. 22, 36. An ALJ may consider that a claimant stopped
11 working for reasons unrelated to the allegedly disabling condition in making a
12 credibility determination. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1040 (9th Cir.
13 2008); *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001). The ALJ
14 reasonably considered Plaintiff’s return to work in evaluating her symptom claims.

15 **B. Medical Opinions**

16 For claims filed on or after March 27, 2017, the regulations provide that the
17 ALJ will no longer “give any specific evidentiary weight...to any medical
18 opinion(s)...” *Revisions to Rules Regarding the Evaluation of Medical Evidence*,
19

20 ⁴ Plaintiff testified that she last worked in May and June 2019, but medical records
21 indicate she reported working in July as well. Tr. 35-36, 910, 911, 914.

1 2017 WL 168819, 82 Fed. Reg. 5867-88 (Jan. 18, 2017); 20 C.F.R. § 404.1520c.⁵
2 Instead, an ALJ must consider and evaluate the persuasiveness of all medical
3 opinions or prior administrative medical findings from medical sources. 20 C.F.R.
4 § 404.1520c(a) and (b). Supportability and consistency are the most important
5 factors in evaluating the persuasiveness of medical opinions and prior
6 administrative findings, and therefore the ALJ is required to explain how both
7 factors were considered. 20 C.F.R. § 404.1520c(b)(2). The ALJ may, but is not
8 required, to explain how other factors were considered. 20 C.F.R. §
9 404.1520c(b)(2); *see* 20 C.F.R. § 404.1520c(c)(1)-(5).

10 *1. Annie Chisholm, ARNP*

11 On October 17, 2018, Ms. Chisholm completed a Medical Report form and
12 opined that Plaintiff is severely limited and unable to meet the demands of full-
13 time sedentary work due to slow recovery from heart surgery, depression, and
14 anxiety. Tr. 726-28. Symptoms included dizziness, sternal chest pain, anxiety,
15 and depression. Tr. 726. She stated Plaintiff had been limited since August 2017

16 ⁵ Plaintiff argues the “specific and legitimate” standard continues to apply despite
17 the new regulations; Defendant argues to the contrary. ECF No. 24 at 14-16; ECF
18 No. 25 at 11-13. A case decided after the parties’ briefs were filed indicates that
19 the new regulations displace the “irreconcilable” and “incompatible” specific and
20 legitimate reasons standard. *Woods v. Kijakazi*, 32 F.4th 785, 790-92 (9th Cir.
21 2022).

1 and would hopefully return to work by May 2019. Tr. 22, 727. She also opined
2 that Plaintiff would miss two days of work per month for follow up appointments
3 with her primary care provider, cardiology, and behavioral health. Tr. 22, 727.

4 In December 2018, Ms. Chisolm completed a DSHS Physical Functional
5 Evaluation form. Tr. 867-70, 74. Ms. Chisolm listed Plaintiff's chief complaints
6 as chronic pain around neck and shoulder and sternal surgical scar, post cardiac
7 operation, with no cardiac symptoms. Tr. 867. She opined that Plaintiff is limited
8 to sedentary work, defined as able to lift 10 pounds maximum and frequently lift or
9 carry lightweight article with the ability to walk or stand only for brief periods. Tr.
10 874. Ms. Chisolm indicated that the current limitations would exist for six months.
11 Tr. 874.

12 The ALJ found that Ms. Chisolm's opinions are not supported by her
13 examinations or the treatment record. Tr. 23. With regard to supportability, "[t]he
14 more relevant the objective medical evidence and supporting explanations presented
15 by a medical source are to support his or her medical opinion(s) or prior
16 administrative medical finding(s), the more persuasive the medical opinions or prior
17 administrative medical finding(s) will be." 20 C.F.R. § 404.1520c(c)(1)-(2). For
18 example, less than two weeks after she completed the Medical Report form noting
19 dizziness as a significant symptom, Ms. Chisolm's treatment notes state that Plaintiff
20 had a recent echocardiogram "which showed no shunting and normal LVEF.
21 Continues to be asymptomatic without dizziness." Tr. 22, 854. Similarly, the ALJ

1 observed that treatment notes made contemporaneously with the December 2018
2 opinion indicate only slightly reduced range of motion, exam findings were
3 incomplete, and there was no narrative which reasonably supports an additional six
4 months of limitation to sedentary work more than six months after her heart surgery.
5 Tr. 23, 871-73. This is a reasonable basis for finding the opinions unsupported.

6 The ALJ also found Ms. Chisolm's opinions are inconsistent with documented
7 improvement, Plaintiff's activities, statements regarding the degree of limitation
8 alleged, and physical exam findings. Tr. 23. "The more consistent a medical
9 opinion(s) or prior administrative medical finding(s) is with the evidence from other
10 medical sources and nonmedical sources in the claim, the more persuasive the
11 medical opinion(s) or prior administrative medical finding(s) will be." 20 C.F.R. §
12 404.1520c(c)(1)-(2). The ALJ found that the limitations assessed by Ms. Chisolm
13 covered the period from August 2017 to May 2019, without regard to improvements
14 in her condition resulting from her May 2018 heart surgery. Tr. 22. Plaintiff
15 appears to misread the ALJ's reasoning and asserts the ALJ erred by stating that Ms.
16 Chisolm did not consider Plaintiff's heart surgery. ECF No. 24 at 16. However, the
17 ALJ's point is that despite her awareness of Plaintiff's heart surgery and documented
18 improvement in her heart condition, Ms. Chisolm's assessment of limitations over
19 the period covered by the opinion did not change. This is a reasonable interpretation
20 of the evidence.

1 Plaintiff argues that the basis for the limitations assessed by Ms. Chisolm is
2 sternal pain, anxiety and depression, not cardiac issues. ECF No. 24 at 17.
3 However, Ms. Chisolm's treatment records support the ALJ's finding that Plaintiff's
4 depression is related to frustration over pain and recovery from surgery and
5 improved with medication. Tr. 18, 704-706, 847. Additionally, Ms. Chisolm did
6 not assess any mental limitations and the ALJ noted that even if some mental
7 limitations were added to the RFC to account for depression and anxiety, the
8 vocational expert testified that those additional restrictions would not preclude work.
9 Tr. 26. Furthermore, as discussed *supra* and referenced by the ALJ, the degree of
10 pain alleged is inconsistent with physical exam findings throughout the record.

11 2. *Kaitlyn Llewellyn, PA-C*

12 In August 2019, Ms. Llewellyn completed a Medical Report form and listed
13 diagnoses of cervicalgia, mild cervical levoscoliosis, cervical spondylosis, and left
14 hip pain. Tr. 742-44. She opined that Plaintiff would need to lie down for 30
15 minutes per day due to neck pain; that work on a regular and continuous basis
16 would cause Plaintiff's condition to deteriorate because work exacerbates
17 symptoms and pain, and that Plaintiff would miss four or more days of work per
18 month because in the last two months, Plaintiff had been seen in the office four
19 times for neck and hip pain. Tr. 742-43. Ms. Llewellyn opined that Plaintiff is
20 limited to sedentary work. Tr. 743.

1 The ALJ found Ms. Llewellyn's opinion unpersuasive because it is not well
2 supported. Tr. 23. The ALJ noted that the assessment of four or more absences
3 from work per month was based on recent medical appointments, which is not a
4 reasonable basis to conclude there will be an ongoing need for future appointments
5 of that frequency. Tr. 23. The ALJ also observed that Ms. Llewellyn's conclusion
6 that work would exacerbate Plaintiff's condition does not consider the relative
7 demands of Plaintiff's recent work sorting cherries, which involved working seven
8 days a week for potentially up to 16-hours per day, verses lighter duty jobs. Tr. 23.
9 Plaintiff argues Ms. Llewellyn was not considering whether Plaintiff could perform
10 past work but was "looking at what [Plaintiff] was capable of doing." ECF No. 24
11 at 17. However, treatment notes made contemporaneously with Ms. Llewellyn's
12 opinion indicate that Plaintiff reported her pain worsened with "prolonged standing
13 at work," so the ALJ's inference is reasonable. Tr. 919. The ALJ also found Ms.
14 Llewellyn's opinion is inconsistent with the record supporting a finding that
15 Plaintiff's back and neck pain are nonsevere, as discussed *supra*. Tr. 18, 23. The
16 ALJ's findings are reasonable and based on substantial evidence.

17 3. *Phillip Hawley, Psy.D*

18 In October 2018, Dr. Hawley completed a Mental Source Statement form
19 and found no greater than mild limitations in any area of mental health functioning.
20 Tr. 731-33. He noted Plaintiff had "demonstrated some anxiety and depression
21 symptoms since her operation" and that he believed "her symptoms should

1 improve through her recovery and with medication.” Tr. 733. He concluded there
2 was minimal to no cumulative effect on Plaintiff’s ability to sustain work. Tr. 732.

3 In July 2019, Dr. Hawley completed a second Mental Source Statement form
4 and assessed two severe and one marked limitation. Tr. 734-37. He opined
5 Plaintiff would be off-task 21-30% of a workday due to cumulative limitations and
6 would miss four or more days of work per month. Tr. 736. He stated the
7 limitations had existed since July 2018. Tr. 736.

8 The ALJ found Dr. Hawley’s 2018 opinion to be persuasive but the July
9 2019 was not persuasive. Tr. 23. The ALJ found that the 2018 is well-supported
10 with the explanation that Plaintiff’s symptoms would improve with recovery from
11 heart surgery and medication and consistent with treatment records suggesting
12 Plaintiff’s symptoms were transitory and improved relatively quickly with
13 medication. Tr. 23. However, the ALJ found Dr. Hawley’s 2019 opinion
14 assessing marked and severe limitations since July 2018 does not explain its
15 inconsistency with the 2018 opinion, which assessed only mild or no limitations as
16 of October 2018. Tr. 23. The ALJ noted Dr. Hawley’s 2019 opinion is
17 unsupported by explanation or the medical record and is inconsistent with
18 Plaintiff’s ability to work for a period of time during 2019. Tr. 23. These findings
19 are supported by substantial evidence.

20 Plaintiff contends that consideration of Plaintiff’s work activity in 2019 does
21 not support a finding that Dr. Hawley’s opinion is inconsistent because Plaintiff

1 sought frequent medical treatment and days off during that time. ECF No. 24 at
2 20. However, as noted *supra*, Plaintiff testified she worked seven days per week
3 during this time, and the record indicates that sorting cherries involves workdays
4 up to 16 hours per day. She testified that her job ended due to the end of the cherry
5 season, not due to frequent absences. Tr. 22, 36. The ALJ's conclusion is
6 reasonable and supported by substantial evidence in light of these factors.

7 4. *Tasmyn Bowes, Psy.D*

8 In December 2018, Dr. Bowes completed a DSHS Psychological/Psychiatric
9 Evaluation form. Tr. 753-57. Dr. Bowes diagnosed major depressive disorder and
10 assessed five moderate limitations, plus two marked limitations in the ability to
11 understand, remember and persist in tasks by following detailed instructions and in
12 the ability to perform activities within a schedule, maintain regular attendance, and
13 be punctual within customary tolerances. Tr. 756. Mental status exam results
14 included tearfulness and dysphoric mood but adequate appearance, normal speech,
15 appropriate and congruent affect, normal thought process, orientation, memory,
16 fund of knowledge, abstract thought, and insight and judgment. Tr 757.
17 Concentration was not within normal limits and a note referred to Trails results,
18 where Plaintiff made one error on Trails A and did not attempt Trails B. Tr. 755,
19 757.

1 The ALJ found that to the mild and moderate limitations assessed by Dr.
2 Bowes are consistent with the longitudinal record which reflects that Plaintiff's
3 mental symptoms are related to frustration over her physical impairments and are
4 transient. Tr. 24. The ALJ noted that the overall record indicates that mental
5 limitations cause no significant limitation in Plaintiff's ability to perform work-
6 related activities for a continuous 12-month period. Tr. 24. The mild and
7 moderate limitations are also supported by Dr. Bowes' mental status exam
8 findings, which is mostly within normal limits except for the Trails test. Tr. 24.

9 The ALJ found that disabling limitations are inconsistent with Dr. Bowes'
10 statement that once Plaintiff obtained stable housing and basic needs, vocational
11 training and services would assist in her long-term stability. Tr. 24, 756. The ALJ
12 also found that to the extent Dr. Bowes' opinion contains greater restrictions than
13 Dr. Hawley's October 2018 opinion, Dr. Hawley's opinion is more persuasive.
14 The ALJ previously discussed reasons for finding Dr. Hawley's supported by and
15 consistent with the record. The ALJ's reasoning and discussion is legally
16 sufficient and supported by substantial evidence.

17 CONCLUSION

18 Having reviewed the record and the ALJ's findings, this Court concludes the
19 ALJ's decision is supported by substantial evidence and free of harmful legal error.


20 Accordingly,

21 1. Plaintiff's Motion for Summary Judgment, **ECF No. 24**, is **DENIED**.

1 2. Defendant's Motion for Summary Judgment, **ECF No. 25**, is
2 **GRANTED.**

3 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
4 Order and provide copies to counsel. Judgment shall be entered for Defendant and
5 the file shall be **CLOSED.**

6 **DATED** April 7, 2023.

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10 LONNY R. SUKO
11 Senior United States District Judge
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